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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1982

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NO._____

JEROME DALY AND
LARRY S. PENDELL,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRITE OF CERTIORARI

TO: THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Comes now your Petitioners and hereby show and Petition the United States Supreme Court as follows:

I.

QUESTIONS PRESENTED FOR REVIEW

1. DID THE GOVERNMENT VIOLATE THE SPEEDY TRIAL ACT, 18 U.S. CODE SEC. 3161 AND 3162 BY FAILING TO OBTAIN A GRAND JURY INDICTMENT WITHIN THE 30 DAY PERIOD AND NOT HAVING OBTAINED AN INDICTMENT UNTIL 140 DAYS AFTER THE ARREST AND COMPLAINT AND BOND, WHERE DEFENDANTS WERE HELD ON BOND WITH TRAVEL RESTRICTIONS WITHIN THE DISTRICT? HELD NO..... 13

2. DOES A U.S. MAGISTRATE HAVE JURISDICTION TO SIGN IN THE PLACE OF A U.S. DISTRICT JUDGE ON A DISMISSAL THAT IS SUPPOSED TO BE SIGNED BY A U.S. DISTRICT JUDGE PURSUANT TO RULE 48, FRCP? THE COURT ERRED IN HOLDING YES..... 17

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## III.

## OFFICIAL REPORTS

The Eighth Circuit Court of Appeals entered Judgment on August 18, 1982, affirming a Judgment of Conviction entered on October 7, 1981 in the United States District Court for the

District of Minnesota Fourth Division for a violation to 21 U.S. Code Sec. 841(a)(1) Controlled Substance Act.

The decision and Judgment in the Court below entered on August 18, 1982 was ordered not to be published. The text of it is a part hereof as Exhibit "A".

## IV.

## JURISDICTION OF THE COURT

The Supreme Court has jurisdiction to review by Writ of Certiorari a decision of the 8th Circuit Court of Appeals Judgment affirming a 1 count Indictment for a claimed violation of 21 U.S. Code Sec. 841 (A)(1), entered August 18, 1982, See Appendix "B".

Jurisdiction is conferred by Article III, U.S. Constitution 28 U.S. Code Sections 1254,. 1651, and 2101 and 18 U.S. Code 3772.

Petition for a rehearing En Banc was filed by mail to the Eighth Circuit Court of Appeals on August 30, 1982. Order denying Petition for rehearing was made and entered in the Court of Appeals on Sept. 10,1982 .

## V.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

A. U.S. CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT [I.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

No person shall be deprived of life, liberty, or property, without due process of law..."

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

AMENDMENT IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## B. U.S. STATUTES AND RULES INVOLVED

**§3161. Time limits and exclusions**

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

**§3162. Sanctions**

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped.

**§3231. District courts**

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

§3041. Power of courts and magistrates

For any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned or released as provided in chapter 207 of this title, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the office of the clerk of such court, together with the recognizances of the witnesses for their appearances to testify in the case.

A United States judge or magistrate shall proceed under this section according to rules promulgated by the Supreme Court of the United States.

§3401. Minor offenses; application of probation laws

(a) When specially designated to exercise such jurisdiction by the district court or courts he serves, and under such conditions as may be imposed by the terms of the special designation, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, minor offenses committed within that judicial district.

Rule 5.1. Preliminary Examination

(a) Probable Cause Finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed

it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in

**Rule 48. Dismissal**

**(a) By Attorney for Government.** The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

**§841. Prohibited acts A**
**Unlawful acts**

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

**§812. Schedules of controlled substances**
**Establishment**

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semi-annual basis during the two-year period beginning one year after October 27, 1970

and shall be updated and republished on an annual basis thereafter.

**Placement on schedules; findings required**

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

SCHEDULE I(c) (1) Marijuana

## VI.

## STATEMENT OF THE CASE

On or about November 17, 1980 a confidential reliable informant informed narcotics agent Baltzer that Defendant Daly would receive an aircraft load of marijuana at Flying Cloud Airport in Eden Prairie, Minn. on or about November 19. The affidavit of Baltzer states; "The informant was reliably provided data that led to the seizure of a large quantity of

contraband in the last 6 months. No basis of the knowledge of the informant was given. There was nothing to show the veracity, credibility or reliability of the informant.

At approximately 11:30 p.m. on Nov. 19, 1980 agents observed Defendant Pendell land his airplane. Shortly after 12:00 a.m. Daly arrived, opened his hangar door at a private section of the airport and the plane was pushed into the hangar for the night. Daly and Pendell left in Daly's car and drove to Daly's place about 20 minutes away for the night.

About 5:00 a.m. Daly and Pendell returned in two cars. The agents were situated with a video camera in another building about 900 feet away. Daly and Pendell proceeded to load the cars. It was still dark out. A street lamp about 250 feet away did not sufficiently light up the area so that the agents could see what was going on.

The agents could see Defendants load something in the cars but they were not sure what it was that was being loaded. They stated it looked like it could be bundles of marijuana.

After the first car was moved ahead a short distance Defendants loaded the second car placing the last package in the back seat.

This was a private area. It was posted, "Keep Out, Aircraft Owners, Pilots and Tenants only".

The agents then ran down an alleyway adjacent to Daly's hangar and through one of the hangars out into the open. When the agents were 90 feet away they shouted to Daly and Pendell that they were under arrest, whereupon Daly and Pendell put up their hands.

At the time of and before the arrest the agents had no factual basis to conclude that the packages contained marijuana.

With their attention trained on Defendants, the agents ran over and arrested Defendants outside their cars. The cars were situated on private property some 900 feet from any road and were immovable because the agents had taken the keys off of Defendants persons outside the cars. No lights were on inside the cars so the package in the back seat was not visible.

The agents testified that before they ran out to arrest Defendants they observed Defendant Pendell place a package in the back seat of the Plymouth.

After the arrest the agents shined their lights into the cars and saw the bundle in the back seat wrapped in opaque paper.

Without a Warrant, the agents seized the cars and drove them off the premises and to

the Federal Building where they removed the bale in the back seat of the Plymouth and took it inside their offices. They left an agent to guard the hangar and its contents while they went to get a Warrant to search it.

They offered no excuse why they could not have left the cars there to be guarded by the same agent who guarded the hangars.

Based on what they found in the cars they obtained a search warrant for the hangar.

A Complaint was filed against Defendants on Nov. 20th and Defendants posted a $10,000 Bond that contained travel restrictions to the Minnesota District.

A probable cause hearing was held on Nov. 25, 1980 and Defendants were bound over to the District Court.

On December 15, 1980 the Asst. U.S. Attorney signed a standard form of dismissal, but it was never signed by a U.S. District Judge. It was signed by J. Earl Cudd, U.S. Magistrate, who ursurped the office of U.S. District Judge. In legal effect the dismissal was null and void. Defendants were never given notice of the dismissal nor were they released from the conditions of the bond.

Some 4½ months later, on April 10, 1981 Defendants were Indicted on a 1 count

Indictment for a violation of 21 USC Sec. 841 (a)(1).

Defendants made motions to dismiss on the grounds that the Speedy Trial Act, 18 USC 3161 and 3162 were violated in that the Indictment was not found within 30 days after the Complaint and Arrest occurred.

Motions to suppress were heard by the Magistrate who made recommendations they be denied and the District Judge denied these Motions on the day of the trial without hearing or considering the evidence himself.

The Controlled Substance Act 21 U.S. Code 812 requires that Schedule I substances have a high potential for abuse; with no currently accepted medical use in treatment in the United States; and a lack of accepted safety for use of the substance under medical supervision.

As is shown by the undisputed facts set forth in the files records and evidence admitted at the trial Marijuana does not fit any of the Schedule I requirements.

Defendant Daly was charged and found guilty of possession with intent to distribute marijuana. There was no evidence that Daly ever at any time distributed marijuana to anyone.

Daly testified at length that he intended to have the marijuana hermetically sealed and thereafter he was going to obtain a Court

Order allowing him to distribute it legally to cancer patients for the treatment of extreme nausea connected with chemotherapy in the treatment of cancer patients and for other admitted medical uses.

The Court denied Defendant's request to instruct the jury; "If such were the case, there would be no unlawful intent to distribute."

The facts will be more fully set forth in the Argument.

## VIII.

## ARGUMENT

1. DID THE GOVERNMENT VIOLATE THE SPEEDY TRIAL ACT, 18 U.S. CODE SEC. 3161 AND 3162 BY FAILING TO OBTAIN A GRAND JURY INDICTMENT WITHIN THE 30 DAY PERIOD AND NOT HAVING OBTAINED AN INDICTMENT UNTIL 140 DAYS AFTER THE ARREST, COMPLAINT AND BOND, WHERE DEFENDANTS WERE HELD ON BOND WITH TRAVEL RESTRICTIONS WITHIN THE DISTRICT? HELD NO.

The Complaint was filed on Nov. 20, 1980 and Defendants posted Bond on that date. Preliminary hearing was held on Nov. 25, 1980 when Defendants were bound over to the District Court.

The U.S. Attorney attempted to dismiss the Complaint on Dec. 15, 1980 but never obtained leave of Court to do so pursuant to Rule 48.

Acting wholly without jurisdiction as will be hereafter shown, the U.S. Magistrate signed his name in the space for the U.S. District Judge to sign.

The Indictment was not found until April 10, 1981 some 141 days after the arrest and filing of the Complaint.

Furthermore, neither the Clerk nor the U.S. Attorney gave notice to Defendants of the attempted dismissal of Dec. 15, 1980. The attempted dismissal also did not release Defendants from the conditions of the Bond they posted.

Defendants made a prompt motion to dismiss the case upon the grounds their speedy trial rights were violated.

Defendants' 5th and 6th Amendment rights were violated as follows:

Amendment 5 provides;

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, nor be deprived of life, liberty, or property, without due process of law.

Amendment 6 provides;

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial.

Under the Complaint and Bond of Nov. 20, 1980 Defendant was held, and his travel was restricted and he was kept from doing his

business, to answer for an infamous crime without an Indictment of a Grand Jury.

The Indictment was not obtained until 141 days later, well beyond the time limits in the Speedy Trial Act.

This delay was also a violation of Magna Charta of 1215, Sec. 40 as follows; "To none will we sell, to none will we deny, or delay, right or justice."

The guarantee of a speedy trial is one of the most basic rights preserved by our Constitution. It is a fundamental liberty embodied in the Bill of Rights. Invocation of the right need not await indictment, information, or other formal charge, but begins with the actual restraints imposed by arrest if it preceeds the formal preferring of charges. See U.S. v. Marion, 404 U.S. 307.

Defendant does not have to show actual prejudice by the delay. See U.S. v. Marion, 404 U.S. 307, 320 (1971); Baker v. Wingo, 407 U.S. 514, 536 (1972).

The length of the delay is very clearly in violation of the Speedy Trial Act, 18 U.S. Code Section 3161 and 3162. These sections are previously set out.

The government gives no reason at all for the delay nor for the failure to notify

Defendant of the purported dismissal.

The trial record shows no reason for the delay. The government presented the same evidence at the trial that they had available to them on November 20, 1980. THis was a deliberate delay and for no good reason.

It is the duty of the prosecution to bring a defendant to trial and the failure of Defendant to demand the right is not to be construed as a waiver of the right. See Baker v. Wingo, 407 U.S. 514, 530 (1972); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

See U.S. v. Iaquinta; U.S.D.C. NW Va. 6/9/81 29 CR.L.Reporter 2328 where it is stated as follows:

DELAY BETWEEN STATE ARRESTS. FEDERAL INDICTMENTS VIOLATED U.S. LAW

Speedy Trial Act requires indictment's dismissal. 90.920 90.930

Concluding that the arrest of two drug defendants pursuant to a state warrant triggered the provisions of the federal Speedy Trial Act, the U.S. District Court for the Northern District of West Virginia dismisses the federal indictments that were lodged against them over four months after their arrests.

The Court goes on to state:

> Furthermore, once a violation of section 3161(b) has been found, the indictment must be dismissed in accordance with sections 3162 and 3163. Section 3162 states that the action may be dismissed with or without prejudice and specifies the factors to be considered when determining the proper course of action. The legislative history indicates that dismissal without prejudice should only be granted in rare instances, and the rule will be dismissal with prejudice.*** After considering the factors enumerated in the statute, the Court must conclude that there has been a violation of the Act and that the mandated sanction is dismissal with prejudice. [End Text] --Maxwell, J. (U.S. v. Iaquinta; U.S.D.C. NW Va. 6/9/81)

It is therefore respectfully requested that the Court reverse the judgment with directions to dismiss the Indictment with prejudice.

2. DOES A U.S. MAGISTRATE HAVE JURISDICTION TO SIGN IN THE PLACE OF A U.S. DISTRICT JUDGE ON A DISMISSAL THAT IS SUPPOSED TO BE SIGNED BY A U.S. DISTRICT JUDGE PURSUANT TO RULE 48, FRCP? THE COURT ERRED IN HOLDING YES.

The attempted dismissal of Dec. 15, 1980 was signed by J. Earl Cudd, a U.S. Magistrate, in the place where it was to be signed by a U.S. District Judge. This rendered the attempted dismissal to be without any legal effect so far as the speedy trial act was concerned. The Magistrate has very limited

jurisdiction. He has jurisdiction over minor offenses pursuant to 18 USC 3401.

18 USC 3401 gives the Magistrate power to make arrest and determine probable cause pursuant to U.S. Supreme Court Rules.

Rules 5 and 5.1 limit his jurisdiction to the preliminary examination in felony cases. All other proceedings shall be had in the District Court.

Rule 48 FRCP provides the U.S. Attorney may dismiss only by leave of Court. After the Magistrate binds a Defendant over to the District Court in the probable cause hearing his jurisdiction ends.

The government has Form No. USA-22 (Ed. 2/15/57), that has a blank for the signature of "UNITED STATES DISTRICT JUDGE" The Magistrate had no jurisdiction to sign his name as a United States District Judge.

The attempted dismissal was of no legal effect and furthermore neither Defendant was notified of it, nor was either Defendant released from the Conditions of the Bond and more importantly the Travel restrictions contained in the Bonds.

As is hereafter shown, criminal jurisdictional statutes are to be strictly construed.

Therefore, the Judgment should be reversed as the attempted dismissal did not stop the speedy trial clock.

3. DOES 18 U.S. CODE SEC. 3231 GIVE THE U.S. DISTRICT COURT JURISDICTION OVER TITLE 21 OFFENSES? THE COURT ERRED IN HOLDING YES.

Title 21, the Controlled Substance Act of 1970, does not vest jurisdiction over Title 21 offenses in any Court. It vests civil jurisdiction in the Court of Appeals but jurisdiction over criminal cases does not exist.

In 1812 the U.S. Supreme Court stated:

> The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense. Certain implied powers must necessarily resort to our Courts of justice from the nature of their institution, But jurisdiction over crimes against the state is not among those powers." United States v. Hudson; 11 U.S. 7 (1812), 7 Cranch 32, 3 Led 259.

It is vastly more crucial for Congress to elucidate the jurisdiction involving any charge claimed to be criminal in nature. As early as 1799, just 10 years after the Constitution went into effect, this problem was addressed:

> If Congress has given the power to this Court, we possess it, not otherwise; and if Congress has not given the power to us or to any other Court, it still remains at the legislative disposal. Turner v. Bank of

North America, 4 Dall 8, 10 (1799).

See also Mayor v. Cooper, 6 Wall 247 (1867) where it is stated:

> As regards the Courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate: The Constitution must have given to the Court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it. It is the duty of Congress to act for that purpose up to the limits of the granted power. They may fall short of it, but cannot exceed it. To the extent that such action is not taken, the power lies dormant.

The revision of Title 18 was passed in 1948. 18 U.S. Code Sec. 3231 is simply a codification of three previous statutes, with no change of substance intended.

See the 1976 U.S. Government printing office copy of the 1976 U.S. Code, 18 USC 3231:

> This section 588d of Title 12 U.S.C., 1940 ed., Banks and Banking; Title 18 U.S.C., 1940 ed., Sec. 546, 547 (Mar 4, 1909, ch. 321, Sec. 326, 340, 35 Stat 1151, 1153; March 3, 1911, ch. 321, Sec. 291, 36 Stat 1167; May 18, 1934, ch. 304, Sec. 4, 48 Stat 783).
>
> This section was formed by combining sections 546 and 547 of Title 18, U.S.C., 1940 Ed., with section 588d of Title 12, U.S.C., Banks and Banking, with no change of substance.

The editorial note following 18 U.S.C. Sec. 3231 in the West edition states: "This section was formed by combining former 18 U.S.C. Sec. 546 and 547 with former 12 U.S.C. Sec. 588d, with no change in substance." Certainly the jurisdiction of the criminal cases intended to be covered by a statute is part of the substance of the statute.

You will notice that the original section 340 stated that it applied to...."The crimes and offenses defined in this Title shall be cognizable...."

See Moore's Federal Practice, Sec. 0.60(3).

> The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it....The first point of reference in determining whether a lower federal court has jurisdiction over a case is a federal statute or statutes. If there is no statutory grant, federal jurisdiction is lacking, for, jurisdiction upon a federal court, except pursuant to a valid statute, cannot be conferred by consent of the parties.

Since statutes must be strictly construed and the intent of the legislators adhered to, it is essential to seek an understanding of the legislative history of the present 18 U.S.C. Sec. 3231.

While the statute (conferring jurisdiction) should receive a fair interpretation, and at times a broad construction, quite generally it is proper to resolve any ambiguity or uncertainty by construing the statute against federal jurisdiction.... Mistake, if any, can be rectified by Congress, if it sees fit to do so. See Moore's, supra, Sec. 0.60(2-3).

Also see 73 Am.Jur.2d "STATUTES" Sec. 325 on Revised Codes:

§325. Generally.
In case of doubt and uncertainty as to the meaning of a provision of a compiled or revised statute, its true meaning may properly be ascertained by resort to the act from which the provision was derived,[43] and particularly is this rule applicable where the code is not subject to a fair construction without consideration of the original statute.[44]

It is well settled that penal statutes are subject to strict construction: more accurately, it may be said that such laws are to be interpreted strictly against the State and liberally in favor of the accused.

See U.S. v. Enmons, 410 U.S. 396, 35 Led.2d 379, 93 S.Ct. 1007 where the Supreme Court stated:

[4] Even if the language and history of the Act were less clear than we have found them to be, the Act could not properly be expanded as the Government suggests—for two related reasons. First

this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity. See cases cited.

It was intended that 18 U.S.C. Sec. 3231 was only a grant of jurisdiction over crimes defined in Title 18. The words "in this title" simply means that it applies only to Title 18 crimes.

No criminal jurisdiction over Title 21 Crimes (CSA, 1970) has been conferred upon any Court. The deposit of criminal jurisdiction still resides in the hands of Congress.

It is respectfully submitted that the Court reverse the Judgment of the District Court and that the Indictment be dismissed for lack of subject matter jurisdiction.

4. WAS DEFENDANTS ARREST WITHOU A WARRANT AN UNREASONABLE SEARCH AND SEIZURE OF THEIR PERSONS? THE COURT HELD YES?

It is Defendant's contention and that of his co-defendant that their arrest on November 20, 1980 at about 5:00 a.m. was illegal from the inception because of lack of probable cause that a felony was being committed.

This case is very nearly the same as Henry v. United States, 361 U.S. 98, 4 Led.2d 134, 80 S.Ct. 168. See 361 U.S. at 103 where the Court states:

*The prosecution conceded below, and adheres to the concession here,[7] that the arrest took place when the federal agents stopped the car. That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete. It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses, as Johnson v. United States, 333 U.S. 10, 92 L.Ed 436, 68 S.Ct. 367, supra, holds.

Defendants were arrested within 4 feet of an Aircraft Hanger Defendant Daly had rented on behalf of Basic Bible Church of America by DEA Agents at about 5:20 a.m., on November 20, 1980.

The Aircraft Hangar and the private property on which Defendants were arrested was in the complete control of Defendant Daly. This property was posted:—"Keep out, Aircraft owners, Pilots and Tenants only." The rows of hangars run North and South. The Agents came out of small doors in the next row of hangars to the east and were 80 to 90 feet away when they shouted to Defendants they were under arrest.

Defendants stood where they were and put up their hands and offered no resistance. The arrest was effected and Defendants liberty of movement was restricted when the officers were 80 feet away in the semi darkness.

The issue is therefore to determine whether at or before the time when the officers were 80 feet away in the semi darkness and ordered Defendants to put up their hands that they were under arrest that they had legally reasonable probable cause to believe that a crime had been committed and that they were legally authorized to make a warrantless arrest under the circumstances.

See Rios v. U.S., 364 U.S. 253, 4 Led.2d 1688, 80 S.Ct. 1431. "Nothing that happened or that was discovered, after the arrest occurred, could make that arrest lawful, or justify a search as its incident" (See additional cases cited).

THE GOVERNMENT HAS THE BURDEN OF PROOF THAT THE ARREST WAS LAWFUL.

The government has the burden of proving that warrantless arrests are reasonable and based upon probable cause. See Coolidge v. New Hampshire, 91 S.Ct. 2022 (1971), 403 U.S. 443:

[8,9] Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'[5] The exceptions are 'jealously and carefully drawn,'[6] and there must be 'a showing by thos who seek exemption*** that the exigencies of the situation made that course imperative.'[7] [T]he burden is on those seeking the exemption to show the need for it.'[8]

See also Aguilar v. Texas, 378 U.S. 108, 12 L.ed.2d 723, 84 S.Ct. 1509 (1964).

Thus an arrest without a warrant is presumed to be unreasonable and unlawful. The burden is upon the government to prove by clear and convincing evidence that the arrest upon this private property was reasonable as based upon lawful probable cause.

THE HEARSAY, UPON HEARSAY EVIDENCE OF A ALLEGED RELIABLE INFORMANT IS NEITHER CREDIBLE NOR RELIABLE INFORMATION UPON WHICH PROBABLE CAUSE CAN BE BASED.

DEA Agent Harold Baltzer testified that within three days of November 20, 1980 a confidential reliable informant advised him that Jerome Daly, an ex-lawyer and official of the Basic Bible Church, would on or about November 19, 1980, receive an aircraft load

of marijuana at Flying Cloud Airport, Eden Prairie, Minnesota.

Baltzer's testimony goes on to state, "The informant was reliably provided data that led to the seizure of a large quantity of contraband in the last six months."

This indicates that the so-called reliable informant was provided data or information from some third person.

Though Agent Baltzer swore that his informant was reliably provided with data in the past six months that led to one arrest he offered no reason or facts in support of this conclusion.

The above is the extent of the information about the informant and the information the informant based his conclusion on.

The evidence in total from the alleged informant rises to nothing more than a rumor. No raw data as to the basis of the informant's conclusion is supplied at all. Such rumors are practically meaningless as far as the law on probable cause is concerned. See USA v. Button, No. 80-1498, 8th Circuit filed July 6, 1981. Also see Aguilar v. Texas, 378 U.S. 108, and Spinelli v. U.S., 393 US 410.

The testimony was that "The informant was reliably provided data that led to the seizure

of a large quantity of contraband in the last six months." None of the underlying circumstances are disclosed as are required in Aguilar v. Texas, 378 U.S. 108 (1964):

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,...the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed,...was 'credible' or his information 'reliable'.

In short the so called informant provided none of the essential requirements; (1) the trustworthiness of Hearsay, (2) the basis of Knowledge prong, (3) the Veracity Prong; (a) the credibility Spur; (b) the reliability Spur. The informant provided no raw data whatsoever.

See Wong Sun v. U.S., 371 US 471 at 497. The Agents had 3 days to get an anticipatory Warrant and failed to so do. This was error on their part.

The acts of landing an aircraft at 11:30 p.m. and placing it in a hangar was an innocent act. Defendants were on their private property where they had the right to be. The act of

going home and coming back and loading packages into the car at the beginning of the work day was an act wholly innocent. From 900 feet away the agents could not tell what was being loaded into the cars in the pre-dawn hours. The agents stated that they saw the last package being loaded into the back seat of the Plymouth from 90 feet away but because they were on the opposite side of the car they could not see what was being loaded, only that a package was being put in the back seat.

The 4 feet distance was a zone of privacy between the hangar and the cars.

See Henry vs. U.S. supra which is in point:

> The requirement of probable cause has roots that are deep in our history. The general warrant,[1] in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed,[2] both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of "probable cause" before a magistrate was required. The Virginia Declaration of Rights, adopted June 12, 1776, rebelled against that practice:

5. WAS THE SEIZURE OF THE ALLEGED TORN BALE AND THE CAR FROM PRIVATE PROPERTY WITHOUT A WARRANT CONSTITUTIONALLY PERMISSIBLE UNDER THE PLAIN VIEW DOCTRINE? THE COURT BELOW HELD YES.

The seizure does not comply with the 3 step analysis established in Coolidge v. New Hampshire, 403 US 445.

1. As outlined above the initial intrusion affording plain view was unlawful.

2. The discovery of the marijuana was not inadvertent.

The facts are not in dispute. Pendell placed the last package in the back seat of the Plymouth car, and the agents testified they saw him do it. From 90 feet away the agents called out to Defendants they were under arrest. The video tape shows the arrest and shows the Defendants putting their hands up and then a few seconds later the agents come into view and all the agents have their attention directed to the Defendants and their design to arrest them. The door of the Plymouth is shut at this time of the arrest and it is too dark for the agents to see what contents of the bale was in the back seat, although they all admit they knew it was there. It is not possible, nor did the agents attempt to claim, that the discovery of the marijuana was inadvertent.

3. The potentially incriminating nature of the evidence was not immediately apparent. The agents could not possibly have known

what it was until they had it tested.

This was not a search incident to a lawful arrest as Defendants were outside the cars and placed with their hands up against the building. The contents of the cars had nothing to do with the arrest.

The search and seizure of the automobiles does not come under the automobile exception. The agents had the keys to the cars when they secured them from Defendants. The cars were not movable and were on private property. They were not on a public roadway.

They had no lawful right to open the doors of the cars or to seize them and take them to the Federal Building without a warrant. They had no basis to believe that the cars contained contraband when they seized them and drove them off of private property. Mere possibility, conjecture, suspicion, or belief is insufficient to support the issuance of a search warrant let alone a warrantless search and seizure. This comes squarely within the holding of Coolidge v. New Hampshire, 403 US 443, where a car was seized from a private driveway on private property when the Court held that the officers could have left some one to guard the car while other agents

went to get a Warrant. The same thing is true here. As a matter of fact an Agent was left to guard the hangar after the arrest. Why could he not also have guarded the cars while they went to get a Warrant to seize them?

There is no excuse. There was no exigency or emergency. See Coolidge v. New Hampshire, 91 S.Ct. 2022 (1971) 403 US 443;

> (8,9) Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the 4th amendment—subject to only a few specifically established and well-delineated exceptions. The exceptions are 'jealously and carefully drawn, and there must be a showing by those who seek exemption*** that the exigencies of the situation made that course imperative. The burden is on those seeking the exemption to show need for it.

The agents have shown no need or lawful emergency what-so-ever to justify their seizure of the cars and driving them off of private property without a warrant.

If they could seize the cars without a Warrant, then why could they not also have seized the hangar and the plane inside it without a Warrant? The hangar was also in plain view!

Since the agents used the evidence they unlawfully seized from the Plymouth to base probable cause to obtain a search warrant for the hangar and the plane, the search of the latter was also illegal and unreasonable.

6. IS THE CLASSIFICATION OF MARIJUANA AS A SCHEDULE I SUBSTANCE UNDER 21 USC 812 A VIOLATION OF DEFENDANTS' DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE 5TH AMENDMENT? HELD, NO.

The classification of Marijuana as a Schedule I substance under 21 USC 812 is an unconstitutional classification from the outset. It is undisputed in the evidence that it has a 3,000 year history as being accepted for medical use. U.S. v. Ervin, 602 F.2d 1183 is not in point. Here Defendants challenge the initial classification of marijuana as a Schedule I substance as being unconstitutional.

To be a Schedule I substance it must be:

(A) "The drug or other substance has a high potential for abuse." All the evidence shows that Marijuana has a very low potential for abuse. It grows wild in a state of nature. It does not need processing. It is just as easy to make ready for use as is tobacco. It is not habit forming. No one has ever been hospitalized for addiction to it. Tobacco is addictive, and cancer producing. Alcohol is addictive and cancer producing. Alcohol

is destructive of brain and liver cells and other cells in the body. Coffee is far more addictive than marijuana. It Is decriminized in 26 states. Also as is shown on page 5 above it is decriminalized for medical use. The findings in Ravin v. Alaska are not disputed by the government, "that there is not even a rational basis for treating marijuana as a more dangerous drug than alcohol." Therefore, it does not meet the requirements of "A".

(B) "The drug or other substance has no currently accepted medical use in treatment in the United States." This is the second requirement. It clearly does not meet this requirement. It has been authorized for medical use in 36 states. See page 5 above. The new proposed Title 18 in the U.S. Senate authorizes a defense on the ground that the controlled substance was obtained by the Defendant pursuant to a valid prescription. The present Schedule I does not permit this.

(a) Smoking marijuana has been proven effective, when used in conjunction with other drugs in reducing the intraocular eye pressure of glaucoma patients.

(b) It is prescribed in its smoked form for cancer patients who are on chemotherapy

and experience extreme nausea and vomiting after their chemotherapy treatments. The smoked form is the most effective as the patient can control it.

(c) It is used as an anticonvulsant in the cigarette form for treatment of certain forms of epilepsy.

(d) It is used for treatment of other neuroligical problems.

(e) It is useful in the treatment of alcoholism and depression.

(f) It is useful in the treatment of arthritis.

It therefore does not meet requirement "B".

(C) "There is a lack of accepted safety for use of the drug or other substance under medical supervision." This is the third finding to support it as a Schedule I drug.

The directors of 3 Minneapolis hospitals testified that marijuana had an accepted medical use and that it was safe under medical supervision. Likewise, Dr. Joel Fort of San Francisco testified that it has a safe, practical medical use. R. E. Mandt, pharmacist from St. Mary's Hospital introduced Daly Exhibit 12 and testified on page 69 of Transcript IV that the National Cancer Institute provides Marijuana cigarettes for cancer

patients. See also the Chang Report, Daly H2, December 1979 which clearly indicates the cigarette form is the best for treatment of nausea from cancer chemotherapy. In the trial, witness after witness testified to its medical use. No evidence was offered by the government to the contrary.

Also the issues were tried by the Magistrate without jurisdiction. The trial court did not try this issue nor make any findings of fact in regard to it.

It was error for the trial court to deny the Motion to dismiss or at least conduct an evidentiary hearing on the propriety of the initial classification and continuing classification of Marijuana as a Schedule I substance.

In the light of 3,000 years of medical use of a plant that grows wild in a state of nature it was error for the trial court not to conduct a hearing and make findings as to the initial unconstitutional classification of Marijuana. Clearly the Magistrate had no jurisdiction to hear any of these matters as he had no statutory jurisdiction and they were beyond even the jurisdiction granted by the rules.

The requirements of the law on classification is clear. Whether or not Marijuana is a Schedule I Controlled substance is a question

of fact to be measured by the law. Since the original classification is unconstitutional it is immaterial what the administrative agency has done.

Marijuana fulfills the definition of an effective drug because the evidence is conclusive that it prolongs life, improves physical condition and reduces pain especially in cancer patients. See Rutherford v. US, 442 US 544.

See file entry No. 38. The U.S. Circuit Court of Appeals for the District of Columbia ordered the Executive Dept. of Gov. on Oct. 16, 1980 to make new findings taking into account new evidence concerning medical use of marijuana.

The equal protection of the laws is a part of the due process clause of the 5th Amendment. See Boling v. Sharpe, 347 US 497.

At the very least, Defendants were entitled to a hearing on their Motion and findings by the Court. In this case the Court conducted no hearing at all. The matter was passed on by the Magistrate who was acting wholly without jurisdiction as is demonstrated above.

7. DID THE DISTRICT JUDGE ERR IN REFUSING GIVE THE JURY DEFENDANT'S THEORY OF DEFENSE INSTRUCTION? HELD NO.

Defendant Daly requested the following instruction.

> It is the theory of the Defendants that on Nov. 20, 1980, they did not knowingly, intentionally and unlawfully possess marijuana with the intent to distribute as charged. The defendants, to the contrary, possessed the marijuana with the lawful intent of obtaining a declaratory judgment in the United States District Court in order to distribute it for the lawful purpose of treating cancer patients undergoing therapy. If such were the case, there would be no unlawful intent to distribute.
>
> In order to justify a conviction in this case, it is necessary that it be proved beyond a reasonable doubt that the defendants possessed marijuana with specific intent to distribute.
>
> Therefore, if you have reasonable doubt whether the defendants possessed the marijuana with the specific intent to obtain a declaratory judgment in the U.S. District Court to distribute marijuana you must find them not guilty.

See U.S. v. Prieskorn, No. 80-1979 (8th Cir. 9/11/81) "It is well established that a defendant in a criminal case is entitled to an instruction on his theory of the case if there is evidence to support it and a proper request is made."

This request sets forth a correct statement of the law. The Court should have instructed on what a declaratory judgment was and the legal effect it would have had on Defendants legal authority to legally distribute marijuana to cancer patients.

The jury may very well not have understood what a Declaratory Judgment was and what the effect of it was. The Court should have explained the effect of a Declaratory Judgment so that the jury would have known there was a reasonable basis in the law for Defendants actions.

Defendant testified that he had no intent to distribute marijuana illegally, but rather get a Court order, after having it hermetically sealed, (quote)...so we could distribute it legally to cancer patients for treatment of nausea connected with chemotherapy in treatment of cancer patients."

The evidence called for the instruction. Otherwise the jury did not know that it was possible to get such a declaratory judgment. This was a lawful way to handle the matter, see Rutherford v. U.S., 1977, 438 Fed. Supp. 1287.

See 8A MOORE'S FEDERAL PRACTICE 30.03(1), at 30-7 (2d ed. 1981)

> A criminal defendant is entitled to have a jury instruction on any defense which provides a legal defense to the charge against him and which has some' foundation in the evidence even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility.

To the same effect see Means v. Solem, 1980, 646 Fed 2d 322.

As long as the evidence was there and it was an issue Defendant was entitled to the instruction on his theory of the case.

It was error not to give requested instruction No. 17.

## CONCLUSION

The Judgment should be reversed and the case dismissed or in the alternative a new trial granted.

WHEREFORE,, your Petitioners pray that a WRIT OF CERTIORARI issue from this Court directed to the Court of Appeals for the 8th Circuit commanding that the record be certified up to the end that the Judgments of the Courts below be reversed and that Petitioners be granted Judgment that the

case be dismissed or Judgment of acquittal or in the alternative a new trial.

Respectfully submitted,

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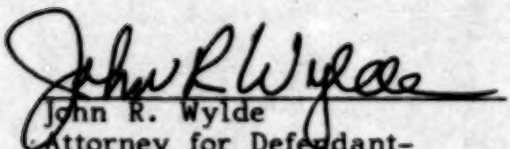

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